No. 14636

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MITCHELL PAUL DOBRENEN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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MITCHELL PAUL DOBRENEN,

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BRIEF OF APPELLEE.

I.
STATEMENT OF JURISDICTION.

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California, on November 10, 1954, under Section 462 of Title 50, App., United States Code, for refusing to submit to induction into the Armed Forces of the United States [Tr. pp. 3-4].

On November 29, 1954, appellant appeared before the Honorable James M. Carter, United States District Judge. He was arraigned and entered a plea of not guilty. The case was set for trial for December 14, 1954 [Tr. pp. 4-5]. On December 14, 1954, trial was begun in the United States District Court for the Southern District of California before the Honorable James M. Carter, without a jury [Tr. pp. 16-47] and at the close of evidence

and argument appellant was found guilty as charged in the indictment [Tr. p. 47].

On December 20, 1954, appellant was sentenced to the custody of the Attorney General for imprisonment for a period of four years [Tr. p. 48].

The District Court had jurisdiction of this cause of action under Section 462 of Title 50, App., United States Code, and Section 3231, Title 18, United States Code.

This Court has jurisdiction under Section 1291 of Title 28 United States Code.

II.
STATUTE INVOLVED.

The Indictment in this case was brought under Section 462 of Title 50, App., United States Code.

The Indictment charges a violation of Section 462 of Title 50, App., United States Code, which provides in pertinent part:

> "(a) Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this title [Secs. 451-470 of this App.], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under oath in the execution of this title [said Secs.], or rules, regulations or directions made pursuant to this title [said Sec.] . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . ."

III.
STATEMENT OF THE CASE.

The Indictment returned on November 10, 1954 charges that appellant was duly registered with Local Board No. 107. He was thereafter classified I-A and notified to report for induction into the Armed Forces of the United States on August 25, 1954 in Los Angeles, California. The Indictment charges that the defendant at that time and place did knowingly fail and refuse to be inducted into the Armed Forces of the United States [Tr. pp. 3-4].

On November 29, 1954, appellant appeared for arraignment and plea before the Honorable James M. Carter, United States District Judge. Appellant was there represented by his attorney, J. B. Tietz, Esq. Appellant entered a plea of not guilty and his case was set for trial for December 14, 1954 [Tr. pp. 4-5].

On December 14, 1954, trial was held before the Honorable James M. Carter, without a jury and at the close of evidence and argument appellant was found guilty as charged in the Indictment [Tr. p. 47].

On December 20, 1954, appellant was sentenced to the custody of the Attorney General for imprisonment for a period of four years [Tr. p. 48].

Appellant assigns as error the judgment of conviction on the following grounds:

I. The District Court erred in failing to grant the motions for judgment of acquittal.

II. The District Court erred in convicting the appellant and entering a judgment of guilty against him (App. Br. p. 8).

IV.
STATEMENT OF THE FACTS.

On September 15, 1948, Mitchell Paul Dobrenen registered under the Selective Service System with Local Board No. 107, Los Angeles, California [Ex. p. 1]*. He gave his date of birth as May 20, 1929 and was at that time 19 years old.

In May 1949, appellant completed his classification questionnaire and in it signed Series XIV "Conscientious Objection to War," requesting a Special Form for Conscientious Objector [Ex. p. 10]. The form was mailed him on October 26, 1950, completed by appellant and returned to the Local Board [Ex. pp. 14-17]. Without taking further evidence on the matter the Local Board classified appellant IV-E on November 8, 1950 and notified him of that classification [Ex. p. 11].

On November 23, 1951 appellant was classified I-O by a vote of 3 to 0 [Ex. p. 11], and on February 14, 1952, appellant was mailed the revised Special Form for Conscientious Objector which was filed by appellant on February 20, 1952 [Ex. pp. 22-25].

On July 23, 1952, appellant was ordered to report for a physical examination. Appellant took the physical examination, was found acceptable for service and notified of the results on August 18, 1952 [Ex. p. 11]. On October 22, 1952, appellant was mailed an "Application of Volunteer for Civilian Work" [Ex. p. 30]. Appellant did not complete that form but instead wrote a letter

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*Ex. refers to Exhibit No. 1, the appellant's Selective Service file. The page numbers are numbers circled on each page in the file.

to the Local Board, received by them on November 10, 1952, stating, "I am considering taking a job in a Defense Plant (aircraft or other)." Thereafter, on November 14, 1952, appellant was classified I-A by the Local Board by a vote of 2 to 0 [Ex. p. 11].

On December 5, 1953, appellant appeared before the Local Board and was retained in Class I-A by a vote of 3 to 0 [Ex. p. 11]. Appellant appealed his classification [Ex. p. 37].

On Appeal appellant was given an investigation and hearing by the Department of Justice. A copy of the résumé of the investigative report can be found at page 52 of appellant's Selective Service file. It reveals that appellant left a job in 1948 stating that he intended to enter the United States Army and further noted appellant's statement that he was considering taking a job in a defense plant. The letter from the Department of Justice to the Appeal Board can be found at pages 50 and 51 of appellant's Selective Service file and in that letter the Department of Justice recommended that appellant's claim for Conscientious Objector's classification be denied based upon a finding by the hearing officer that appellant's claim was not made in good faith.

The Appeal Board adopted the classification of the Local Board and the recommendation of the Department of Justice and classified appellant I-A on July 6, 1954 by a vote of 3 to 0 [Ex. p. 53]. On August 12, 1954, appellant was sent an Order to Report for Induction, ordering him to report for induction on August 25, 1954 [Ex. p. 57]. On August 25, 1954, appellant reported to the induction station but refused to be inducted into the Armed Services of the United States [Ex. pp. 60-61].

V.

ARGUMENT.

POINT ONE.

A. Appellant Was Not Entitled to Receive a Copy of the Report of the Hearing Officer to the Department of Justice.

Appellant in his brief (p. 9) here argues that a registrant is entitled to receive a copy of the Hearing Officer's report to the Department of Justice. Appellant further states that this was considered by the Supreme Court and that the Court ruled that it constituted a denial of due process, citing *Gonzales v. United States,* 348 U. S. 407. Such was not the holding of the *Gonzales* case. The Court said (p. 417):

> "We hold that the over-all procedure set up in the statute and regulations, designed to be 'fair and just' in their operation, . . . require that the registrant receive a copy of the Justice Department's recommendation and be given a reasonable opportunity to file a reply thereto."

Nothing is said in that opinion about any requirement that a copy of the Hearing Officer's report to the Department be furnished a registrant. There is no authority for such a procedure. Appellant's position with respect to the *Gonzales* case is unsound.

B. Appellant Was Advised of the "Thrust" of the Department of Justice Recommendation to the Appeal Board.

It should be noted that in this case appellant made the record at the trial below that he did not receive a copy of the Attorney General's recommendation to the Appeal Board [Tr. p. 36]. The situation here is thus to be

contrasted with the situation in the companion cases of *Clark v. United States,* No. 14634 and *Kaline v. United States,* No. 14635. In neither of those cases was any such evidence offered.

Thus, appellant here brings himself within the doctrine of *Gonzales v. United States, supra,* and the only remaining question is whether the facts in the *Gonzales* case can be distinguished from the facts here. Appellee believes that they can, for the record shows that the investigation and hearing by the Department of Justice developed no facts of which appellant was not made aware prior to his hearing by the Department of Justice. The résumé of the investigative report given appellant before his hearing [Ex. p. 52], plus the remaining material in appellant's Selective Service file contains all of the information alluded to in the Department's letter of recommendation [Ex. pp. 50-51]. The mandate of the *Gonzales* case, *supra,* is (p. 414):

> "The petitioner was entitled to know the thrust of the Department's recommendation so he could muster his facts and arguments to meet its contentions."

In its letter of recommendation the Department adopts the recommendation of the Hearing Officer and states [Ex. 51]:

> "The Hearing Officer concluded from *all the evidence* that the registrant's conscientious-objector claim was not based on religious training and belief and that the registrant's claim is *not made in good faith.*" (Emphasis added.)

Thus the Department's recommendation was not based upon any single fact or factor but was based upon all the evidence and, obviously, upon the demeanor of appellant before the Hearing Officer. *All* the evidence was

known to the appellant and it is difficult to see how appellant might benefit from the right to file a statement before the Appeal Board, when the conclusion reached by the Hearing Officer was that appellant was in bad faith. Appellee submits that on this basis the instant case can be distinguished from the *Gonzales* case. On the other hand, should this Court conclude that where the record reveals that a registrant was not given a copy of the Department's recommendation and that no prejudice need be shown thereby, then appellee agrees that the *Gonzales* case is dispositive of this appeal and the instant case must be reversed. This statement is limited to the case where appellant has made the record at the trial in the District Court that he did not receive a copy of the Department of Justice's recommendation.

C. The Hearing Officer Did Not Fail to Report Any Evidence Material to Appellant's Claim.

In Appellant's Brief (p. 10) appellant makes the contention that the Hearing Officer and the Department of Justice withheld material information concerning appellant's conscientious objector claim. Appellant refers us to the record without citing in his brief any fact so withheld. The record shows [Tr. p. 37] that the appellant testified concerning the letter from the Department of Justice as follows:

> "Well, he states in his report that my limitations to the Molokan Church attending is due—I told him is due to the fact that I don't understand Russian. And that is true. But also I stated that I belong to the Young Russian Christian Association and attend Bible class on Wednesday and Sunday evenings, and service on Sunday and, help—

Q. How often do you attend them? A. Regularly.

Q. You mean every week? A. I miss a few times, yes."

This fact is not specifically alluded to in the letter of the Department of Justice to the Appeal Board, just as many other facts in a Selective Service file are specifically mentioned in that letter. Surely the Department of Justice, in its letter, is not expected to repeat every fact already in a Selective Service file. In the instant case the remarks of appellant at the trial were already contained in his Selective Service file. The résumé of the investigative report [Ex. p. 52] reveals:

> "A leader of the Young Russian Christian Association advises that the registrant regularly attends meetings of that association, as well as the Molokan Church."

And later in the résumé the comments of a fellow employee are recorded:

> "He stated that the registrant attends church and bible study classes regularly."

Thus, the matter complained of by appellant was in his Selective Service file and before the Appeal Board at the time it classified him.

The only other matter that appellant alleges was unreported by the Hearing Officer is found at page 39 of the Transcript of Record:

> "I mentioned to him the fact that on the investigative report there is one point that was not correct. It states that he left a job without notice. But I did talk it over with the superintendent before I left the job. And they said I never did—I didn't go

> back to work over there. But after the first of the following year I worked there for about a month at the same place that I left."

This testimony by appellant appears to allude to the remark in the résumé of the investigative report, "A supervisor stated, however, that the registrant went on his vacation and then started to work for another man and never came back to work again." This matter is not mentioned in the letter of the Department of Justice to the Appeal Board, but there is a sound reason why this is so. Whether appellant did or did not give notice when he left a job has no bearing on his conscientious objector claim. There is no indication anywhere in the record that this statement in the résumé of the investigative report was used against the appellant. Indeed, this Court would take a dim view of any Local or Appeal Board denying a conscientious objector claim on such a tenuous basis.

Appellant in his brief (p. 10) quotes *Linan v. United States,* 202 F. 2d 693, 694, to the effect:

> "It goes without saying that an advisory report could be so factually incorrect as to vitiate its usefulness, but we have no such situation here."

In the instant case there is no evidence whatsoever that the Department's letter is factually incorrect and appellant's claim is only that the Department did not place emphasis on matters that *he* desired them to emphasize.

D. The Recommendation of the Department of Justice Is Supported by the Evidence.

It should be noted at the outset that the recommendation of the Department of Justice is predicated upon a finding of *bad faith* by the registrant [Ex. p. 51]—in other words, a finding that appellant claimed to be a conscientious objector not because he was one, but only in an effort to avoid military service. This is a very important distinction for it removes this case from the category of cases like *Franks v. United States* (9th Cir.), 216 F. 2d 266, cited by appellant. In that case the Court said that if a registrant is *sincere,* his willingness to work in a defense plant would not be inconsistent with the I-A-O classification. In the instant case the Hearing Officer found that appellant was insincere and there was evidence—in addition to his attitude and demeanor before the Hearing Officer—to support that conclusion. The résumé of the investigative report [Ex. p. 52] shows that appellant left his place of employment in September 1948 giving as his reason that he was intending to enter the United States Army. Yet, a few months later in May in 1949, appellant filed his classification questionnaire [Ex. pp. 4-11] wherein he claimed to be a conscientious objector. Again, while appellant expressed his willingness to enter the Service in 1948, when he filed his Special Form for Conscientious Objectors in February 1952, [Ex. pp. 22-25] he asserted that he acquired his beliefs from the Molokan Church and from the Young Russian Christian Association and that he had born into the

Church and joined the Association in 1944. Later, on October 22, 1952, the Local Board sent appellant an "Application of Vounteer for Civilian Work" [Ex. p. 30]. This form was sent appellant in connection with the civilian work program for conscientious objectors. Appellant did not return the form—which of itself is not to be held against him. Instead, however, appellant sent a letter to the Local Board received November 10, 1952 [Ex. p. 28], stating, "I am considering taking a job in a defence Plant (aircraft or other)." After receiving this letter the Local Board, and later the Appeal Board and the Hearing Officer, could hardly help but question the good faith of appellant in his conscientious objector claim.

In his Special Form for Conscientious Objector appellant was asked in Question 6 of Series II [Ex. p. 23], "Describe the actions and behavior in your life which in your opinion most conspicuously demonstrate the consistency and depth of your religious convictions." Appellant replied, "Regular attendance at church. . . ." Yet, it was revealed in the résumé [Ex. p. 52], in the Hearing Officer's report [Ex. p. 50], and at the trial [Tr. p. 37], that appellant's church attendance was very irregular and limited to marriages and funerals. Appellant's explanation for poor attendance (that the services were in Russian and he did not understand the language) is perhaps a satisfactory one, but the fact remains that his statement in the Special Form for Conscientious Objectors was knowingly *false*.

In *Witmer v. United States,* 348 U. S. 375, the Supreme Court endorsed a searching inquiry into the sincerity and good faith of a claimant for a Conscientious Objector classification. The Court said at pages 381-382:

> ". . . any fact which casts doubt on the veracity of the registrant is relevant."

In the *Witmer* case the Court upheld the registrant's I-A classification noting among other things that while he claimed to be a conscientious objector he promised to increase his farm production and contribute a satisfactory amount for the war effort.

Thus it is to be seen that the recommendation of the Department of Justice was based upon fact, in addition to the attitude and demeanor of appellant at his hearing before the Hearing Officer.

POINT TWO.

Appellant Was Not Denied Due Process of Law Because the Local Board Did Not Have a Person With the Title of "Advisor."

Here, as in the companion cases of *Clark v. United States,* No. 14634, and *Kaline v. United States,* No. 14635, appellant urges that he was denied due process of law because the Local Board did not have "Advisors to Registrants" under Section 1604.41 of the Selective Service Regulations (32 C. F. R. 1604.41). That section describes the duties of advisors as "to advise and assist registrants in the preparation of questionnaires and other Selective Service forms and to advise the registrants on other matters relating to their liabilities under the Selective Service Law." Colonel Keeley's testimony [Tr. pp. 26-35] reveals that there is no one with the title of advisor, but his testimony also shows that there are 47 Local Boards in Los Angeles County, that there is a Government Appeal Agent for each Local Board to advise and assist registrants, that there are 144 registrars in Los Angeles County who advise and assist registrants, and 151 board

members in Los Angeles County who advise and assist registrants. In addition there are the clerks at each Local Board and the District Coordinator's office available to registrants. The records shows that after each classification appellant was mailed a Notice of Classification [Ex. p. 11]. The record also reveals that that form states in italics, "For advice see your Government Appeal Agent" and further advises the registrant of his rights of appeal [Tr. pp. 31-32]. In addition, Colonel Keeley testified that there has always been some information on the bulletin board at the Local Board office concerning advice [Tr. p. 35]. It might be noted at this point that all the evidence concerning advisors came from an official of Selective Service and the appellant was not asked whether he had ever examined the bulletin board of his Local Board.

Surely, it cannot be said from this record that appellant was denied due process of law because someone did not have the title of "Advisor." No one would argue that if there was no regulation concerning advisors a registrant was denied due process of law, for no right given him under the Act or the Constitution would be invaded. How then can the failure to have someone with that title constitute a denial of due process? Either the Director of Selective Service has created a new constitutional right, or it is a mere irregularity. If it is, at most, a mere irregularity, then there must be some evidence or inference of prejudice to the registrant. There is no evidence in the instant case that appellant was prejudiced and no inference can be drawn to that effect.

Appellant treats this matter as having been disposed of in the case of *Chernekoff v. United States,* 219 F. 2d 721. The *Chernekoff* case does not decide anything with

reference to advisors. It mentions it only in passing and reaches no conclusion. Appellee submits that in the instant case the failure to have someone with the title of advisor is at most an irregularity, that appellant was not prejudiced thereby, and that this point is without merit.

POINT THREE.

The Evidence Shows That Appellant Was Given an Opportunity to Go Through the Induction Ceremony and Refused to Do So.

This Court ruled in the *Chernekoff* case, *supra,* that a registrant must be given a definite opportunity to be inducted or refuse to be inducted into the Armed Services. The Court held in that case that Chernekoff was not given such an opportunity. Appellant in his brief (p. 12) urges that the evidence in the instant case is the same as the evidence in the *Chernekoff* case. However, this Court states in the *Chernekoff* case, page 725:

> ". . . the appellant was not given the prescribed opportunity to step forward, nor the prescribed warning. The Army deemed it useless to apply the Special Regulation to the appellant as he had said he would not if asked to so do step forward and become inducted into the Armed Forces."

There is no such evidence in the instant case. There is no evidence that appellant was not asked to take the one step forward and there is no evidence that he was not given the warning prescribed by the Army regulation.

It is presumed that the regulations were followed:

> "A presumption of regularity attaches to official proceedings and acts; it is a well settled rule that all necessary prerequisites to the validity of official action are presumed to have been complied with, and *where the contrary is asserted it must be affirmatively*

shown." (*Koch v. United States,* 150 F. 2d 762, 763 —a Selective Service case from the 4th Cir.) (Emphasis added.)

Therefore the presumption exists in this case that appellant was ordered to take the one step forward. It is a presumption that can only be overcome by affirmative evidence to the contrary. At the trial below appellant took the witness stand on his own behalf [Tr. pp. 35-43]. He was represented by his attorney, J. B. Tietz, Esq. Nowhere in appellant's testimony is there any indication that he was not ordered to take the one step forward or given the prescribed warning.

The only evidence offered at the trial supports the conclusion that he was in fact asked to take the one step forward-even excluding for the moment the presumption of regularity. The induction procedures are found in Special Regulation 16-180-1. As a part of that same regulation Induction officials are required in paragraph 27(b)(1) to ask each such registrant to make a signed statement of his refusal to be inducted. This statement is found at page 60 of the Exhibit. Paragraph 27(b)(2) provides for the sending of a notice of such refusal to the United States Attorney and this notice can be found at page 61 of the Exhibit. These steps clearly are the last ones taken by induction officials when a registrant refuses induction and the only inference that can fairly be drawn from the evidence is that appellant refused to take the step forward, thereafter signed a statement to that effect and that the induction officials notified the United States Attorney—all done under the same Special Regulation concerning induction.

Thus the burden was upon the appellant to rebut the Government's showing in the District Court.

It should be noted that this question concerning the induction of appellant was never mentioned in the trial below. No evidence was offered on it by the appellant. It was never mentioned or argued in any motion addressed to the Court. Here for the first time on appeal, it is urged upon the Court. For this reason appellee does not believe that it is a proper question for this Court's consideration.

The reason why appellant was not questioned concerning the events at the induction station and the inherent danger in the Court considering this point now, can be seen when the case of *Bradley v. United States*, 218 F. 2d 657 (9th Cir.), (certiorari granted and reversed on other grounds on March 28, 1955) is examined. In that case the evidence offered by the Government *was exactly the same as the evidence offered here.* As a matter of defense Bradley attempted to show that he was not given an opportunity to refuse induction. This Court ruled his showing was inadequate from his own testimony, even though as a matter of fact he was never asked to take a formal one step forward. In the instant case, had appellant raised this point at the trial of the case of Government could *at least* have produced evidence to fall within the *Bradley* case.

POINT FOUR.

There Was a Basis in Fact for the I-A Classification.

The argument presented here is substantially the same as the argument presented in Section D of Point One of Appellant's Brief and appellee's reply thereto is the same. As heretofore noted, the final I-A classification was based upon *bad faith* by the appellant. This conclusion of bad faith and the I-A classification are based upon facts

> *shown.*" (*Koh v. United States,* 150 F. 2d 762, 763 —a Selective Service case from the 4th Cir.) (Emphasis added.

Therefore the presumption exists in this case that appellant was ordered to take the one step forward. It is a presumption that can only be overcome by affirmative evidence to the contrary. At the trial below appellant took the witness stand on his own behalf [Tr. pp. 35-43]. He was represented by his attorney, J. B. Tietz, Esq. Nowhere in appellant's testimony is there any indication that he was not ordered to take the one step forward or given the prescribed warning.

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The reason why appellant was not questioned concerning the events at the induction station and the inherent danger in the Court considering this point now, can be seen when the case of *Bradley v. United States,* 218 F. 2d 657 (9th Cir.). (certiorari granted and reversed on other grounds on March 28, 1955) is examined. In that case the evidence offered by the Government *was exactly the same as the evidence offered here.* As a matter of defense Bradley attempted to show that he was not given an opportunity to refuse induction. This Court ruled his showing was inadequate from his own testimony, even though as a matter of fact he was never asked to take a formal one step forward. In the instant case, had appellant raised this point at the trial of the case of Government could *at least* have produced evidence to fall within the *Bradley* case.

POINT FOUR.

There Was a Basis in Fact for the I-A Classification.

The argument presented [illegible] is substantially the same as the argument presente[illegible]tion D of Point One of Appellant's Br[illegible] a[illegible]eply thereto is the same. As heretofore [illegible] A classification was based upon *bad fa*[illegible]. This conclusion of bad faith and [illegible]ion are based upon facts

contained in appellant's Selective Service file: (1) that about the same time appellant was claiming to be a conscientious objector to Selective Service officials he quit a job and gave as his reason that he intended to enter the United States Army, (2) when asked to complete a form concerning civilian work in lieu of induction appellant did not complete the form but sent a note to the draft board stating that he was considering taking a job in a defense plant, (3) appellant stated that he attended church regularly when in fact his attendance was most infrequent and largely limited to funerals and marriages.

See:

Witmer v. United States, supra.

The District Court found that there was a basis in fact for the I-A classification and this finding is supported by substantial evidence.

VI.
CONCLUSION.

The Judgment of the Court below is supported by substantial evidence and its Judgment should be affirmed.

Respectfully submitted,

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